IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

AMERICAN WASTE MANAGEMENT AND RECYCLING, LLC Plaintiff, v. CEMEX PUERTO RICO; CANOPY ECOTERRA CORP, Defendants.	Civil No. 07-01658-JAF Breach of contract; collection of moneys; damages. Jury trial demanded.

MOTION FOR CLARIFICATION OF ORDER (Docket No. 25) AND OPPOSITION TO AWMR'S REQUEST (DOCKET NO. 28).

TO THE HONORABLE COURT:

COMES NOW Defendant **CEMEX PUERTO RICO** (hereinafter, "CEMEX") and through the undersigning attorneys, respectfully **states** and **prays**:

1. On August 17, 2007, plaintiff American Waste Management and Recycling, LLC ("AWMR"), filed a "Motion Requesting Order" (Doc. No. 14). The motion is premised on alleged (1) bad faith conduct on the part of CEMEX, and (2) events related to AWMR property located at the CEMEX cement plant in Ponce. AWMR's Motion, however, is unclear as to any specific remedy it requests.

2. On August 22 and 28, 2007, Canopy Ecoterra and CEMEX, respectively filed their oppositions to AWMR's Motion (Docs. Nos. 15, 19). These oppositions basically explained

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that Ecoterra employees are not working in CEMEX's Cement Plant in Ponce.

3. On September 11, 2007, this Honorable Court granted AWMR's Motion Requesting Order (Doc. No. 25). CEMEX is more than willing to comply with such Order, but is unable to do so. The Court's Order and applicability are unclear because AWMR only moved the Court to "grant this motion in its entirety, together with any relief which it may deem just and proper under the law." See, Doc. No. 14.

4. If AWMR requests that Canopy Ecoterra personnel not be allowed into the Ponce cement plant, once again, CEMEX informs this Honorable Court that it stayed all dismantling and removal of scrap in its Ponce cement facilities once AWMR's and Ecoterra's dispute arose. CEMEX took security precautions to prevent the disappearance of the dismantled and removed material in controversy. Furthermore, CEMEX is not a party to the agreement between Ecoterra and AWMR and it has no say or objection to either party's request regarding the removal of machinery and "harvested" material, as long as CEMEX property, personnel and operations are respected and protected.

5. As such, to the extent AWMR moved the Court for an Order to stay the removal of scrap metal, and that this Honorable Court has granted the motion, CEMEX respectfully

informs the Court that it is in compliance with such Order. Should the Order address any other issue, CEMEX requests a clarification of the extent of the Order.

6. Today AWMR filed a "Request for Preservation Order at CEMEX Site and for Inspection in Accordance to Docket No. 25", alleging harvested material has been removed, when it is not so, and requesting an inspection of "any and all CEMEX facilities in Ponce". Such a request is unreasonably overbroad and onerous.

7. CEMEX facilities in Ponce not only include the cement plant where AWMR was engaged by Ecoterra to dismantle and remove materials, they also include a lime plant, a ready mix plant, the transport site, and another plant in the Mercedita area. AWMR's subcontract with Ecoterra **only included the dismantling and removal of scrap material specified in its exhibit 1**. Exhibit 1 to the subcontract exclusively lists equipment and machinery specified by CEMEX in its "Scope of Work" for the principal contract; equipment which is **only located in the cement plant**. See, Exhibit 1 Complaint (Docket No. 1), Ecoterra/AWMR Contract's Ex. 1 "Items to be Dismantled and Removed"; Exhibit 2 Complaint (Docket No. 1), CEMEX's contract with Ecoterra, Scope of Work and Plan arrangement.

8. AWMR's position —that it was contracted to "dismantle the plant in its entirety"— is false and, at best, is a very flawed attempt to mislead this Honorable Court. A simple review of AWMR's subcontract, which includes the plant's layout and specifications, clearly shows the restricted list of items it was to dismantle, and that these items were all located exclusively within the cement plant.

9. As such, AWMR is **not** entitled, contractually or otherwise, to the entry, inspection, and worse yet, *video recording* of all CEMEX facilities in Ponce. There is no relevant evidence in all premises; the contract regarding the above captioned complaint was not executed or performed in any CEMEX sites other than the cement plant in question. AWMR has no entitlement over any materials found anywhere else in CEMEX facilities or, for that matter, over materials it has not dismantled or loaded. See, Exhibits 1 and 2 to Complaint (Doc. No. 1), CEMEX/Ecoterra contract and Ecoterra/AWMR subcontract.

10. During the initial hearing on AWMR's request for TRO, the Honorable Court expressed doubts regarding the existence of irreparable harm in this case, due to the contractual nature of AWMR's claim. Thus, no real urgency has been shown. AWMR's only justification for its onerous request is an alleged entitlement to certain property which may

'disappear'. This situation may be easily redressed with monetary compensation. Absent any urgency, any request for inspection of premises is really a request for discovery of evidence, and should be treated as such by this Court. Given that AWMR has not contacted CEMEX's counsel of record to coordinate a date for the Fed. R. Civ. Proc. 26(f) conference, or initiated discovery proceedings, including a formal request through counsel of record of entry for inspection under Fed. R. Civ. Proc. 34, a Court Order for these purposes is premature.

11. Given the controversies of fact created by the newly expressed extent of AWMR's "Request for Protective Order," if this Court were to decide that an Order of such magnitude may be warranted, in the alternative, CEMEX respectfully requests that this Honorable Court set a status conference before emitting such Order, so as to hear all the parties, discuss the issues involved regarding AWMR's Request, and perhaps schedule discovery and other events in the case.

WHEREFORE, defendant **CEMEX Puerto Rico**, respectfully requests this Honorable Court **GRANT** the present motion and note that CEMEX is in full compliance with the Court's September 11, 2007 Order (Doc. No. 25). In the alternative, and only if necessary, CEMEX requests the Court set a status conference to discuss all matters related to the actual case, including the extent of its Order, and schedule the remaining events in the case.

RESPECTFULLY SUBMITTED.

I HEREBY CERTIFY that today I electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to all counsel of record.

In San Juan, Puerto Rico, this 13th day September of 2007.

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